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No.

In The

SUPREME COURT of the UNITED STATES

October Term 1998

JOSE MANUEL PLAZA, a.k.a., JOSE EMANUEL PLAZA, a.k.a., MANUEL PLAZA, a.k.a., EMANUEL PLAZA , Individually, and As Assignee of THE ESTATE OF SCOTT ALLEN WISSER, Deceased and As Assignee of HAROLD LLOYD WISSER and FERN VIOLA WISSER, CO-Administrators of THE ESTATE OF SCOTT ALLEN WISSER, Deceased,

Petitioner,

- v -

THE GENERAL ASSURANCE COMPANY a.k.a., THE GENERAL ACCIDENT INSURANCE COMPANY,

Respondent

On Petition for a Writ of Certiorari to the New York State Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

This is a declaratory judgment action pertaining to an insurance contract construction proceeding in which the main question presented for review is relatively simple:

1. Whether there is *any* ambiguity in the meaning of the term "communicable disease" in an exclusionary endorsement of the homeowner's personal liability insurance policy in issue, as applied to Acquired Immune Deficiency Syndrome [hereinafter "AIDS"], Human Immune Deficiency Virus [hereinafter "HIV"] disease, and HIV infection, which could have the effect of depriving individuals with disabilities the rights afforded by the Americans With Disabilities Act [hereinafter "ADA"], and the 14th Amendment to the U.S. Constitution?

In asking this Court to grant the Writ of Certiorari, it is respectfully submitted that the following questions presented for review are necessarily related to the foregoing main question:

2. Did the petitioner, Jose Manuel Plaza, show that an undefined term, 'communicable disease' exclusionary endorsement, in respondent, The General Assurance Company's a.k.a.The General Accident Insurance Company's [hereinafter, "General Accident"], Homeowner's Personal Liability Policy's was ambiguous by being overly broad, as it applied to AIDS, HIV disease, and HIV infection, because it could be construed to exclude coverage for personal injury claims which are inextricably intertwined with the transmission of "AIDS, HIV disease, and HIV infection", but where the defendant insured, did not actually transmit the AIDS virus to the claimant thus having a discriminatory impact upon some persons with disabilities but not others, in violation of the Americans With Disabilities Act [hereinafter "ADA"], and the Fourteenth Amendment to the United States Constitution? (R. 7, 16, 120-122).

3. Whether or not, at the time the Insured purchased the respondent, General Accident's Homeowner's Personal Liability Insurance Policy, there existed *any* ambiguity with respect to the Insurer's "Communicable Disease" Exclusionary Endorsement, which would have justified the Insured's belief that bodily injuries that arise

out of the negligent transmission of Acquired Immune Deficiency Syndrome [hereinafter "AIDS"], and Human Immune Deficiency Virus [hereinafter "HIV"], were exempted from the said endorsement?. (R. 83, ¶ 20; 129; 140-144; 158; 180-181; 305; 307; 310)

4. Does a 'Communicable Disease' Exclusionary Endorsement in an Insurer's Homeowners Personal Liability Insurance Policy unambiguously include within its purview, AIDS, HIV disease, and aysmptomatic HIV, notwithstanding the fact that New York State enacted legislation which states that the terms AIDS, HIV disease, and HIV infection, are not "communicable diseases"pursuant to the well publicized provisions of Public Health Law, Sections 225(5)(h), 2307, & 2311?. (R. 17-18; 27-29 ¶¶ 19-25; 47;72 ¶ 27; 83 ¶ 20)

5. When deciding whether or not an alternative construction of the term 'communicable disease' is reasonable, should the Court ask whether any reasonably informed insured, living in New York State, and particularly, New York City, would be justified in concluding, absent specifically expressed words to the contrary that, pursuant to the well-known protections afforded by New York State Public Health Law, Article 27, that AIDS, HIV infection, and HIV disease, are excepted from the subject exclusionary clause as covered matters under the policy? (R. 18)

LIST OF PARTIES

The parties below were plaintiff-appellant, Jose Emanuel Plaza, individually, and in his capacity as assignee of the Estate of Scott Allen Wisser, deceased, and defendant-respondent, the General Assurance Company a.k.a. General Accident Insurance Company [hereinafter "General Accident"].

In addition to General Assurance Company, the Group consists of the following companies:

General Accident Insurance Company of America
General Accident Insurance Company of New York
Potomac Insurance Company of Illinois
Camden Fire Insurance Association
Pennsylvania General Insurance Company
PG Insurance Company of New York

According to respondent, General Accident companies should have finalized a merger with Commercial Union Assurance Company sometime in or about June or July of 1998 and that, the merged company will be known as CGU Insurance. Upon information and belief, Commerical Union is an English stock company.

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CITATIONS OF OPINIONS AND ORDERS ENTERED

Jose Manuel Plaza, &C., v. The General Accident Assurance Company, Mo. No. 1015, (New York State Court of Appeals, Aug. 31, 1998), motion to reargue denied;

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Jose Manuel Plaza, &C., v. The General Accident Assurance Company, M-7988, Index # 104878/96 (2nd Dept. Mar. 5, 1998), Decision;

Jose Manuel Plaza, &C., v. The General Accident Assurance Company, Appeal No. 62074 (2nd Dept. Nov. 20, 1997), Order; Jose Manuel Plaza, &C., v. The General Accident Assurance Company, Index # 104878/96 (Sup. Ct., [carol Huff, J.] May 14, 1997).

JURISDICTION

This Court has jurisdiction, pursuant to Rule 10 (c) to review this Writ of Certiorari because a state court (The New York Appellate Division, First Dept.), has decided an important question of federal that has not been, but should be, settled by this Court, and also because the state court has decided an important federal question in a way that conflicts with relevant decisions of this Court.

This Court has jurisdiction, pursuant to Rule 14, to review this matter since 90 days has not transpired since the last order issued by New York State's Court of last resort.

(i) The New York State Court of Appeals entered an Order

denying petitioner's motion for leave to appeal to the Court of Appeals on July 7, 1998.

(ii) Petitioner timely filed a motion to reargue. The Order denied petitioner's motion to reargue the Court of Appeal's denial of the prior motion for leave to appeal to the Court of Appeals. The order sought to be reviewed was entered by the New York State Court of Appeals on August 31, 1998. Ninety days from August 31, 1998, would be November 29, 1998.

CONSTITUTIONAL PROVISIONS

U.S. Constitution, 14th A., Section 1. which states in part, "nor shall any State... deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. §§ 12101 et. Seq., Americans With Disabilities Act

42 U.S.C. § 12132 (3.) Structure of Rights and Obligations.

The Americans With Disabilities Act [hereinafter "ADA"], gives each qualified individual with a disability the right not to be subjected to discrimination by a public entity because of the disability.

STATEMENT OF THE CASE

Petitioner commenced this Declaratory Judgment action on March 15, 1996, for a determination of his rights arising out of the defendant General Accident's, disclaimer of coverage and failure and refusal to defend a prior action instituted by petitioner, herein (R. 21). In that prior action, commenced on August 23, 1993, in the Supreme Court of the State of New York, County of New York under Index Number **9 3/ 1 2 1 5 7 5**, the underlying Verified Complaint therein, as amended, dated November 9, 1993, set forth seven causes of action against the Estate of SCOTT ALLEN WISSER for the

wrongful intentional, negligent, fraudulent, and criminal transmission of the AIDS virus, inflicting a horrendously fatal bodily injury (R. ¶ 41 at 228), by acts and/or omissions to act on the part of the deceased SCOTT ALLEN WISSER and five causes of action against the administrators of the Estate in their individual and administrative capacities (R. 220-262).

General Accident disclaimed coverage of the matter preeminently because an exclusionary endorsement, in the personal liability insurance policy barred a defense or indemnification where the complaint alleged personal injuries that arise out of the transmission of a "communicable disease by the insured." (R. 139-147) The litigation continued notwithstanding General Accident's disclaimer.

Upon defendant's motion, Justice Carol E. Huff of the Supreme Court of the State of New York, County of New York, before whom the action was pending, dismissed the underlying Complaint in its entirety. Her decision was dated December 23, 1993, but was not entered until March 8, 1994 (R. 149).

The Order of Dismissal of the underlying Complaint was appealed to The Supreme Court, Appellate Division, First Department (R. 149-165).

The underlying Complaint was subsequently reinstated by Order and Decision of the Appellate Division, First Department dated April 25, 1995 to the extent that the Appellate Division reversed the prior Order of Dismssal of the lower Court dated March 8, 1994 reinstating the Second, Third, Fifth and Sixth Causes of Action in the Complaint against the Estate pertaining to negligence and fraud, as well as, ordering the release of decedent's HIV confidential medical records, and affirming the lower court's dismissal of all the causes of action against the Administrators of the Estate in their individual and administrative capacities (R.149-165).

In its decision respecting the seventh cause of action in the underlying complaint pertaining to a violation of Public Health Law § 2307, which provides that "[a]ny person who, knowing himself or herself to be infected with an infectious venereal disease, has sexual intercourse with another shall be guilty of a misdemeanor", the

Appellate Court stated:

> While Public Health Law does not define the term venereal disease, it clearly -- although not explicitly-- excludes HIV infection from that category. Suffice to say that under Public Health Law there are entirely separate statutory schemes for HIV testing (see, e.g., Public Health Law §§ 2781 and 2782) and for the examination of persons suspected of being infected with venereal disease (see, e.g., Public Health Law §§ 2300, 2301 and 2302). It is significant that while there are mandatory testing requirements relating to those suspected of being infected with venereal disease (Public Health Law § 2300), persons suspected of being infected with HIV virus cannot be compelled to undergo testing...Accordingly, even if the allegations are deemed sufficient to state a claim that decedent knew that he was HIV positive when he engaged in sexual intercourse with plaintiff, this cause of action was properly dismissed." Plaza v. Wisser, 211 A.D.2d 111 (1st Dept. 1995). (R. 158)

Thereafter, both parties sought leave to appeal to the Court Of Appeals, but the Appellate Division, First Department denied both parties' motions on August 10, 1995 (R. 266).

Following the decision of the Appellate Division, as indicated above, the attorneys for the parties to the underlying action, recognizing the likelihood that all Estate assets would be depleted long before the underlying action came to trial, entered into good faith arms length settlement negotiations in or about August, 1995.

The settlement negotiations culminated in the parties entering into the Stipulation of Settlement which provided in pertinent part that, upon the expiration of thirty (30) days subsequent to notifying General Accident of the Stipulation of Settlement, the Estate and its administrators agreed to assign to Plaza, upon the said expiration of thirty (30) days, any and all rights the Estate or

they, in their administrative capacity, may have against the defendant, General Accident, with respect to reimbursement of legal fees and other expenses incurred by the Estate occasioned by General Accident's alleged wrongful refusal to defend the Estate or its co-administrators in their representative capacity with respect to those causes of action which a court of competent jurisdiction may determine said insurance company to have been obligated to defend (R.267-273).

In addition, the Estate and its administrators also agreed to assign to Plaza any and all rights that the Estate or they, in their administrative capacity, may have against General Accident occasioned by its alleged wrongful refusal to indemnify the Estate or them with respect to those causes of action that a court of competent jurisdiction may determine said insurance company to be, or to have been, obligated to indemnify the Estate of Scott Allen Wisser, Harold Lloyd Wisser, and Fern Viola Wisser, as co-administrators of the Estate, with respect thereto (R.267-273).

That , indeed, despite the alleged wrongful disclaimer, defendant was given notice of, and afforded the opportunity to, participate in the settlement of the underlying action prior to its finalization and were apprised of the fact that, upon the expiration of thirty (30) days subsequent to defendants having been notified of the Stipulation of Settlement, said Stipulation would become effective and the monies would be paid in settlement to plaintiff and the aforementioned Assignment would be delivered to plaintiff's attorneys (R.180).

That notwithstanding that notice, defendant General Accident chose to remain mute and therefore, upon the expiration of thirty (30) days subsequent to defendants having been notified of the Stipulation of Settlement, said Stipulation went into effect and the monies to be paid in settlement were in fact paid to plaintiff and the aforementioned Assignment was delivered to plaintiff's attorneys (R.273). The Assignment appears as **Exhibit F** to the underlying Complaint (R 166-186) .

Thereafter, plaintiff, in his capacity as assignee, and in his individual capacity as the injured party, and potential third party

beneficiary of the subject insurance policy, validly instituted the within action for declaratory judgment (R.21-35).

Justice Carol E. Huff of the Supreme Court of the State of New York, County of New York, before whom the action was pending, granted General Accident's cross-motion for summary judgment and declared that General Accident was not obligated to defend and/or indemnify the claims under the Policy because the lower Court determined that there was no ambiguity in defining the term "communicable diseases", in the subject exclusionary clause, as it applies to AIDS, HIV infection, or HIV disease (R. 18).

The lower Court concluded that the *medical* definition of communicable diseases is the *only* "plain and ordinary" definition possible stating, "Plaintiff by use of the expedient of the list tries to transmute the ordinary and plain meaning of the term by utilizing a bureacratic fiction to subvert the definition (R. 18)".

REASONS FOR GRANTING THE WRIT

I. BECAUSE BY ALLOWING THE STATE COURT'S DECISION IN DETERMINING, THAT THERE WAS NO AMBIGUITY WITH RESPECT TO THE QUESTION OF WHETHER A PERSON INFECTED WITH HIV HAS A 'COMMUNICABLE DISEASE' WITHIN THE MEANING OF AN INSURER'S COMMUNICABLE DISEASE EXCLUSIONARY ENDORSEMENT IN A HOMEOWNER'S PERSONAL LIABILITY INSURANCE POLICY TO STAND, IT SETS A DANGEROUS PRECEDENT WHEREBY INSURERS CAN VIOLATE THE ADA AND THE 14TH AMENDMENT TO THE U.S. CONSTITUTION WITH IMPUNITY.

Petitioner contends that this Court should hear this case because the New York State ruling effectively discriminates against persons with AIDS and HIV-related disabilities. Insureds have a reasonable expectation that they will be provided a defense and indemnification for AIDS and HIV-related causes of action that do not allege actual transmission of the virus. Moreover, although plaintiffs

with AIDS and HIV-related disabilities or who are perceived to have such disabilities or merely fear being infected, will not be foreclosed from "having their day in court", or from obtaining a favorable judgment, they will be precluded from actually obtaining restitution for personal injuries that 'arise out of the transmission of the virus by the defendant insured, whereas persons with other types of disabilities, will not be prevented from securing restitution from the defendant insured's insurance carrier.

A. General Accident's 'Communicable Disease' Exclusionary Endorsement Is Overly Broad Because It May Be Construed To Preclude A Host Of HIV-Related Causes Of Action That Have Nothing To Do With The Actual Transmission Of The Deadly Virus By The Insured To The Plaintiff.

In a case called Playford v. Phelps Memorial Hospital Center, N.Y.L.J., Vol. 220, No. 85, at 31 Col. 4 (Oct. 30, 1998), plaintiff sued defendant hospital for ordinary negligence in giving her a false-negative HIV blood test result, when in fact, she was HIV-positive and pregnant when the test was administered, and as a result of the false report, two of her four children were born HIV-positive. The implication was that, if plaintiff knew she was HIV-positive, she may have chosen to abort the pregnancy, and not attempt to have any more children. Playford v. Phelps Memorial Hospital Center, N.Y.L.J., Vol. 220, No. 85, at 31 Col. 4 (Oct. 30, 1998), highlights the problem with, respondent, General Accident's exclusionary endorsement.

If General Accident was the insurer of the insured defendant hospital in Playford v. Phelps Memorial Hospital Center, Id., General Accident could have easily refused to defend the action notwithstanding the fact that plaintiff did not allege that she actually contracted the virus from any negligent act by the defendant hospital. But the lawsuit alleges that the defendant hospital's negligence, in not properly apprising plaintiff of her HIV positive status, proximately caused the transmission of the deadly virus to plaintiff's children.

Although the defendant in Playford did not actually

proximately cause the transmission of the virus to the plaintiff, nevertheless, because the lawsuit alleged personal injuries that "arose out of the transmission of a 'communicable disease' by the insured hospital (albeit to her children)", respondent, General Accident probably would have disclaimed coverage there for the same reasons it disclaimed coverage here.

The problem is that HIV can be transmitted in a variety of ways. It may be transmitted via intentional or negligent heterosexual or homosexual sexual activity; injection of drugs involving needle sharing; in utero; from breast milk; from accidental needle sticks; from HIV contamminated blood or blood products; and other forms of contamminated materials. See Webber, David, AIDS AND THE LAW, Third Edition, at 14-15 and accompanying notes (1997).

General Accident's philosophy, and by extension, New York State's, via its decision letting stand the Appellate Court ruling, could blanketly exclude coverage for any and all personal injury causes of action that relate to HIV and AIDS pursuant to its communicable disease exclusionary endorsement regardless of whether or not the insured actually transmitted the virus that causes AIDS. As long as HIV is inextricably intertwined with, or merely exists with, the cause of action in issue, General Accident could disclaim coverage.

There is nothing in General Accident's exclusionary endorsement that specifically states the defendant must have *actually* transmitted the deadly virus. It merely states that, if plaintiff alleges personal injuries that arise out of the transmission of a communicable disease by the insured, that is sufficient to trigger the exclusionary endoresement.

Here, as in Playford v. Phelps Memorial Hospital Center, N.Y.L.J., Vol. 220, No. 85, at 31 Col. 4 (Oct. 30, 1998), respondent, General Accident's Communicable Disease Exclusionary Endorsement is broad enough to improperly exclude coverage for a potentially viable covered claim such as in Playford v. Phelps Memorial Hospital Center because it may be construed to preclude a host of HIV-related causes of action that have nothing to do with the actual transmission of the deadly virus by the insured to the plaintiff. Id.

B. If Insurers Have Total Discretion To Exclude Coverage For All HIV-Related Causes Of Action, As Occurs Where The Term Remains Undefined, A Large Class Of Americans Will Not Be Truly Afforded The Protections Of The ADA.

The number of people infected with the AIDS virus reached national epidemic proportions many years ago. See Webber, David, AIDS AND THE LAW, Third Edition, at 7-10 and accompanying notes (1997). Because it is a most horrific and deadly disease, it is one of the most feared diseases in the history of mankind. It is also a disease that inflames the worst of passions causing people in unprecedented numbers, to discriminate against those who are infected with HIV or perceived to be infected with HIV, or those who merely associate with people who are known to be infected with HIV, or perceived to be infected with HIV. The variety of discriminatory acts seem to be endless, from discrimination in employment, housing, education, health care[1], insurance and other areas of law.

If a plaintiff directly or indirectly alleges that the insured proximately negligently caused the transmission of the AIDS virus to the insured, or directly or indirectly negligently exacerbated an HIV-related condition, there is a very real danger that insurers will be able to disclaim coverage and indemnification for those causes of action in violation of the ADA. The potential is there for a large class of Americans to be deprived of compensation under the ADA.

This result is patently unjustifiable. Such a generalized exclusionary endorsement should not survive judicial scrutiny. Yet, because AIDS and HIV is so feared by the majority of the population, the mere mention of a cause of action that involves HIV transmission can trigger the disclaimer.

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[1] Bragdon v. Abbott , 118 S.Ct. 1206 (Mar. 9, 1998) involved the refusal of a dentist to treat an asymptomatic HIV positive dental patient in his office. The dentist was sued under the ADA. Id.

C. If Insurers Have Total Discretion To Exclude Coverage For All HIV-Related Causes Of Action, As Occurs Where The Term Remains Undefined, A Large Class Of Americans Will Be Deprived Of The Equal Protection Of The Law Because Persons With Communicable Diseases Other Than HIV, Will Have Little Trouble Obtaining Insurance Coverage Against Claims For Personal Injuries That Do Not Allege Actual Transmission By The Insured, Whereas Those Insurance Claims Against Those Who Are HIV Positive, Or Perceived To Be HIV Positive, Or Merely Fear Being HIV Positive, Will Likely Be Deprived Of A Defense And Indemnification Available To Other Insureds

It has been estimated that millions of Americans are infected with HIV. By 1995 over one-half million died of AIDS. See Webber, David W., AIDS AND THE LAW, Third Edition at 7 (1997). AIDS and HIV-related causes of action span the spectrum of possible viable claims from bodily injuries that result from the actual transmission of the deadly virus, to all manner of discrimination claims. Id.

What the State court ruling does is to effectively permit insurance carriers to discriminate against a large class of persons - those insureds who are alleged to have caused personal injuries that do not involve actual transmission of HIV by the insured, but allege indirect transmission, or feared transmision, or claims which merely coexist with AIDS and HIV. Petitioner argues that because insurerds can easily be denied equal justice under the law, the ruling also violates the 14th Amendment to the U.S. Constitution.

D. If Insurers Have Total Discretion To Exclude Coverage For All HIV-Related Causes Of Action, As Occurs Where The Term Remains Undefined, A Large Class Of Americans Will Be Deprived Of The Equal Protection Of The Law Because Plaintiffs With Communicable Diseases Other Than HIV, Will Have No Trouble Obtaining Compensation For Personal Injuries That Do Not Allege Actual Transmission By The Insured, Whereas Those Who Are HIV Positive, Perceived To Be HIV Positive, Or Merely Fear Being HIV Positive, Will Likely Be Deprived Of Recovery

What the State court ruling does, is set up a two-tier ADA caste recovery system - those plaintiffs whose disabilities which do not 'arise out of the transmission of HIV-related communicable diseases by the insured', will likely receive compensation for their disabling injuries, while those whose disabilities do allegedly 'arise out of the transmission of HIV' will be barred from receiving restitution for their disabling injuries from insurance companies. Because they can easily be denied equal justice under the law, the ruling also violates the 14th Amendment to the U.S. Constitution.

E. The Question Of Whether An Insurer Should Be Required To Specify If AIDS And HIV Are Included Within The Purview Of A Communicable Disease Exclusionary Endorsement, And To Clearly Define Under What Circumstances It Will Not Provide A Defense And Indemnification, Is Well-Suited For Review Because It Easily Flows From The Recent United States Supreme Court Decision In Bragdon v. Abbott.

This Court recently ruled in Bragdon v. Abbott, 118 S.Ct. 1206 (Mar. 9, 1998), that persons infected with, or perceived to be infected with the virus that causes AIDS, are disabled within the meaning of the ADA at all stages of the infection, notwithstanding that there may be no outward signs or symptoms of any disease. See Bragdon v. Abbott, 118 S.Ct. 1206 (Mar. 9, 1998) Id.

Thus, this Court should be aware of the fact that that AIDS

and HIV infection are not like any other 'communicable diseases' not only in its devastating physical, emotional, financial consequences, but in technologies' inability to get immediate results of an HIV test. There still remains a "window period" during which a person will not test positive for HIV notwithstanding the fact that the person *is* infected with the deadly virus. See Webber, David, AIDS AND THE LAW, Third Edition, at 35 and accompanying notes (1997).

At the time that the deceased purchased the liability policy in issue, that window period could have lasted anywhere from a few weeks to two years. Thus, even if a plaintiff tested negative six months from the date of a single alleged exposure, that does not mean plaintiff was actually HIV negative.

Because of that the peculiar nature of the 'disease, this Court should easily understand why petitioner argues that it was incumbent upon General Accident to specify under what conditions AIDS and HIV were not included under its exclusionary endorsement. It could not justifiably exclude all personal injury causes of action pertaining to AIDS and HIV, especially where it is alleged that the defendant did not actually transmit HIV directly to plaintiff.

Therefore, the question of whether an insurer should specify if AIDS And HIV are included within the purview of a Communicable Disease Exclusionary Endorsement is well-suited for review because it easily flows from the recent United States Supreme Court Decision In Bragdon v. Abbott, 118 S.Ct. 1206 (Mar. 9, 1998).

F. The Question Of Whether There Is Any Ambiguity In An Undefined Communicable Disease Exclusionary Endorsement Is Sufficiently Important To Warrant This Court's Attention.

Because a large class of people may be detrimentally affected by the State Court decision in the instant matter, the question of whether there is any ambiguity in an undefined 'communicable disease' exclusionary endorsement, is sufficiently important to warrant this Court's attention.

II. BECAUSE THE QUESTIONS PRESENTED FOR REVIEW RAISE A PURE ISSUE OF LAW OF UTMOST IMPORTANCE UNDER THE ADA, AND BECAUSE THEY RAISE A SIGNIFICANT AND CHALLENGING PURE ISSUE OF LAW UNDER THE 14TH AMENDMENT TO THE U.S. CONSTITUTION.

By letting stand the Appellate Division, First Department's decision in this matter, New York State's Highest Court, essentially concluded that the defendant Insurer's "Communicable Disease" Exclusionary Endorsement was not ambiguous as it relates to AIDS, HIV disease, and HIV infection.

III. BECAUSE THE STATE COURT'S DECISION IN DETERMINING THAT THERE WAS NO AMBIGUITY WITH RESPECT TO WHETHER AIDS AND HIV INFECTION ARE 'COMMUNICABLE DISEASES' WITHIN THE MEANING OF AN INSURER'S COMMUNICABLE DISEASE EXCLUSIONARY ENDORSEMENT, DECIDED THE ISSUE IN A WAY THAT CONFLICTS WITH A UNITED STATES 3RD CIRCUIT COURT OF APPEALS DECISION.

A. The State Court Of Last Resort Ignored The Holding In A Significant United States Court Of Appeals Decision Directly On Point Which Held That An Exclusionary Endorsement Was Ambiguous By Being Overly Broad Even Where AIDS Is Expressly Specifically Excluded From Coverage Under A "Sexually Transmissible Disease" Exclusionary Endorsement.

In a federal circuit case, 12th Street Gym, Inc. V. General Star Indemnity Company, 1996 WL 489230 (Aug. 28, 1996, 3rd Cir. (Pa.)), the United States Court of Appeals, Third Circuit, ruled that an insurer's "Sexually Transmitted Disease Exclusion" [hereinafter "STDE"], is ambiguous and vacated the District Court's Order granting the defendants' motion for summary judgment based upon the District Court's judgment that the exclusion was unambiguous.

The Court of Appeals determined that, notwithstanding the fact that AIDS was included within the purview of the exclusionary wording, the exclusion nevertheless, does not bar coverage. Id.

General Star's policy of general liability insurance provided coverage for four different categories of harm, one of which was "personal injury". See 12th Street Gym, Inc. V. General Star Indemnity Company, 1996 WL 489230 (Aug. 28, 1996, 3rd Cir. (Pa.)). Attached to the policy was an endorsement that contained the following exclusion which stated in pertinent part:

*2 15.Sexually Trasmitted Disease Exclusions (GSI-52-C200)

> This insurance does not apply to "bodily injury"..., with respect to any claim, suit, or cause of action arising directly or indirectly out of instances, occurrences or allegations involving sexually transmitted diseases, ***including Acquired Immune Deficiency Syndrome (AIDS)*** (emphasis added). This exclusion shall apply regardless of the legal form any claim may take. As an example, this insurance shall provide no coverage for a claim alleging that any Insured knew, or should have known, diseases might be sexually transmitted.

12th Street Gym, Inc. V. General Star Indemnity Company, 1996 WL 489230 (Aug. 28, 1996, 3rd Cir. (Pa.)).

The opposing arguments in In See 12th Street Gym, Inc. V. General Star Indemnity Company, are significantly instructive with respect to the instant case. General Star argued on appeal that the STDE unambiguously precludes coverage for the [plaintiff's] claims. Id. General Star contended that the STDE barred all claims in the lawsuit because plaintiff's "disease was so central and integral to the alleged actions...that, but for the disease, [plaintiff] would not have a claim." Id.

Essentially, the plaintiff in 12th Street Gym, Inc. V. General Star Indemnity Company, argued that the insurer only intended to bar coverage for claims alleging the transmission of diseases through sexual activity and because the plaintiff's allegations in 12th Street

Gym were premised only on the existence of AIDS, and not transmission or exposure to the disease, it was maintained that the claims should not be excluded from insurance coverage. Id.

As the Court of Appeals so aptly pointed out, "each party examines the language of the STDE and draws opposite conclusions regarding the "clear and unambiguous" language of the provision." See 12th Street Gym, Inc. V. General Star Indemnity Company, 1996 WL 489230 (Aug. 28, 1996, 3rd Cir. (Pa.)).

The Court of Appeals in See 12th Street Gym held that there were **two equally reasonable interpretations** of the exclusionary clause pertaining to sexually transmitted diseases. On the one hand, is the reasonable interpretation that the "mere existence" of (and reference to) a sexualy transmitted disease in an oral or written publication might establish a "personal injury" that is excluded from coverage." Id. On the other hand, another equally reasonable interpretation of the STD exclusionary clause would limit the exclusion to claims alleging transmission, or **fear or transmission** (emphasis added), of disease through sexual conduct. See 12th Street Gym, Inc. V. General Star Indemnity Company, 1996 WL 489230 (Aug. 28, 1996, 3rd Cir. (Pa.)).

The Court accentuated the fact that the "mere existence" interpretation "would virtually eliminate coverage for an extremely broad set of claims." Id. It stated, "this interpretation might exclude coverage for injuries sustained in a fall caused in part by the weakened physical condition of a person with AIDS." The wide range of claims excluded by the "mere existence" interpretation tends to undermine its validity. Hence, both the "mere existence" and the "conduct or exposure" interpretations have some basis in the text of the policy." Id.

Since the STDE yields two equally reasonable interpretations, the Third Circuit held the exclusion was ambiguous. The Court further held, since the STDE was ambiguous, the insurer was required to defend and indemnify the defendants in the underlying action. Id.

In the subject exclusionary endorsement before this Court, the "mere existence" of HIV infection could virtually eliminate

coverage for an extremely broad set of claims. As in 12th Street Gym, the extreme broadness of the range of claims category excluded by the "mere existence" interpretation, absent anything more, tends to undermine its validity. See 12th Street Gym, Inc. V. General Star Indemnity Company, 1996 WL 489230 (Aug. 28, 1996, 3rd Cir. (Pa.)).

Since General Accident's exclusionary endorsement yields two equally reasonable interpretations, pursuant to federal case law in 12th Street Gym, Inc. V. General Star Indemnity Company, 1996 WL 489230 (Aug. 28, 1996, 3rd Cir. (Pa.)), here too, the wide range of claims excluded by the "mere existence" interpretation tends to undermine its validity. Hence, both the "mere existence" and the "conduct or exposure" interpretations have some basis in the text of the instant policy." (R. 291-325)

1. The Federal Third Circuit Case Is Applicable To The Instant Case Before A New York State Court

The fact that See 12th Street Gym, Inc. V. General Star Indemnity Company, is a Pennsylvania case should have been of no import respecting any attempt to argue that it should be of no precedential value in New York because Pennsylvania apparently has the exact same insurance rules as does New York pertaining to ambiguities in insurance policies.

By way of example, and not by way of limitation, the Court of Appeals in See 12th Street Gym, Inc. V. General Star Indemnity Company, 1996 WL 489230 (Aug. 28, 1996, 3rd Cir. (Pa.)) mentions, "***Where the language of an insurance policy is clear and unambiguous, it must be given its plain and ordinary meaning.***" Id. The Court of Appeals naturally cited to a Pennsylvania case. Id.

The lower court , in its decision, order, and judgment in the instant action, at 4, contains nearly identical language as the above quoted Third Circuit Court of Appeals opinion. It states, "***The terms of an insurance policy shall be given their plain and ordinary meaning.***" Id. citing Government Employees Insurance Company v. Kligler, 42 N.Y.2d 863, 397 N.Y.S.2d 777 (1977). See Decision,

Order, and judgment at Id.

Also, mentioned in 12th Street Gym is the rule that "***where the language is ambiguous, "the policy provision is to be construed in favor of the insured and against the insurer, the drafter of the agreement***". Id. Plaintiff emphasizes that, under New York Law, "***Where there are ambiguities in an insurance policy, New York courts construe the policy liberally in favor of the insured and strictly against the insurer.***" See Propis v. Fireman's Fund Ins. Co, 112 A.D.2d 734, 492 N.Y.S.2d 228, affirmed 66 N.Y.2d 828, 498 N.Y.S.2d 363, 489 N.E.2d 250 (1985).

If anything, New York law makes it more difficult for insurers to prevail on ambiguity issues than Pennsylvania law because of the wording "strictly construed against the insurer." Yet, the State Court omitted any mention of this crucial federal case.

In the instant case, "Communicable Diseases" are a far broader term than "Sexually Transmitted Diseases". But, criticially, because of the nature of the disease which makes it technologically impossible to always know whether there was actual transmission of HIV by the Insured to the plaintiff, the arguments presented in 12th Street Gym are absolutely applicable to the issue before New York's Court.

If the Court in 12th Street Gym found the policy's STDE broad, what would it have said about the policy in issue before this Court? There can be no question that "communicable diseases" are even broader that STDES. General Accident's failure to define, with a high degree of specificity, what was excluded by the term "communicable diseases" renders its exclusionary endorsement ineffective and causes it to have been obligated to defend and indemnify the Estate in the underlying action and Petitioner individually, and as assignee of the Estate, in the current action.

In summary, General Accident's "communicable disease exclusionary endorsement" is ambiguous for numerous reasons, **any one** of which is sufficient for this Court to find in favor of Petitioner. Some of those reasons are:

1. Since AIDS and HIV disease are "communicable diseases" from a ***medical*** perspective, but are not "communicable

diseases" under New York State Public Health ***Law*** §§ 2311 & 2307, or the New York City Sanitary Code 10 NYCRR 2.1, it plainly has two different distinct meanings in New York State and New York City laws, codes, rules, and regulations, rendering the term "communicable disease", absent anything more, unclear as to which meaning is to be applied to the term;

2. Since AIDS, HIV disease, and HIV infection, may all be contracted in various ways, it is unclear whether or not the term "communicable disease" would exclude coverage where the deadly virus was not communicated **from one *person* to another**, but from one ***object*** to a person, that is, for example, where a health care worker pricks a finger on blood that was drawn from a patient;

3. Since AIDS, HIV disease, and HIV infection, may all be contracted in various ways, it is unclear whether or not the term "communicable disease" would exclude coverage only where the deadly virus was contracted by actual "***conduct***" between persons or more broadly, by any means;

4. Since AIDS, HIV disease, and HIV infection, may all be contracted in various ways, it is unclear whether or not the term "communicable disease" would exclude coverage where the deadly virus was "***incidental***" to the claim, allegation, or suit as described in 12th Street Gym, Inc. V. General Star Indemnity Company, 1996 WL 489230 (Aug. 28, 1996, 3rd Cir. (Pa.)) - effectively precluding coverage for discrimination claims, defamation claims, or ADA claims.

IV. BECAUSE IT IS AN IMPORTANT MATTER ABOUT WHICH THE STATE COURT OF LAST RESORT REFUSED TO ENTERTAIN AND LET STAND THE LOWER COURT'S DECISION WHICH SO FAR DEPARTED FROM ACCEPTED AND USUAL COURSE OF JUDICAL PROCEEDINGS, AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER.

A. The New York State Appellate Division, First Department's Decision In Plaza v. Wisser, Corroborated The Fact That The Term 'Communicable Disease', Standing Alone, Is Unequivocally Ambiguous Because It Is Subject To Two Antithetical Interpretations Pursuant To New York State's Entirely Separate Statutory Scheme For AIDS, HIV Infection And HIV Disease.

The Appellate Division, First Department, in Plaza v. Wisser, 211 A.D.2d 111 (1st Dept. 1995), corroborated the fact that the term "communicable disease" is subject to two antithetical interpretations pursuant to New York State's entirely distinct statutory schemes for AIDS, HIV infection, and HIV disease. Id. at 10 (R. 158).

Under one statutory scheme, the term "communicable disease" pertains to certain diseases that incorporate the medical definition of "communicable disease". Under the second statutory scheme, the term "communicable disease" does not incorporate the medical definition of communicable disease.

Because there are two entirely distinct statutory schemes for AIDS, HIV infection, and HIV disease, under New York law, the term "communicable disease", standing alone, absent delimiting explanatory phraseology, in an insurance carrier's Communicable Disease Exclusionary Endorsement, must be considered ambiguous.

1. Under One Statutory Scheme, Certain Diseases *Are* Listed As Communicable Diseases Pursuant To The *Medical* Usage Of That Term Defined As Diseases That Are "Capable Of BeingTransmitted"

Under one statutory scheme, certain diseases *are* listed as communicable diseases pursuant to the *medical* usage of that term defined as diseases that are "capable of being transmitted". AIDS, and HIV disease, from the point of view of physicians who are infectious disease specialists, are communicable and sexually transmissible diseases because they are capable of being transmitted via contact with bodily fluids containing infected cells or plasma such as blood, semen, vaginal secretions, breast milk, or

saliva. See THE MERCK MANUAL, SIXTEENTH EDITION, at 78 (1992).

Thus, under one construction of the term "communicable disease" as it is found in a medical manual or dictionary, there can be no doubt that the The Public Health Council and the Commission of Health, would be medically justified in determining that people afflicted with AIDS or who were HIV seropositive ***and*** symptomatic, had communicable diseases.

2. Under The Second Statutory Scheme, AIDS, HIV Infection, And HIV Disease, Are *Not* Communicable Diseases Pursuant To The *Legal* Usage Of That Term Under New York State Public Health *Law*, § 2311.

Under the second statutory scheme, AIDS, and HIV disease, are ***not*** communicable diseases pursuant to the *legal* usage of that term under New York State Public Health Law. AIDS, HIV infection, and HIV disease are not included in the list of communicable or sexually transmitted diseases under New York Public Health Law § **2311. Sexually transmissible disease list.** See MCKINNEY'S CONSOLIDATED LAWS OF NEW YORK, PUBLIC HEALTH LAW, at 90 (1993).

A challange to this determination, based upon allegations that the Commissioner of Health and Public Health Council exceeded their authority by refusing to designate HIV infection as a communicable or sexually transmissible disease, and that the determination was arbitrarily and capriciously made, was dismissed thus upholding the decision to keep HIV out of the list communicable disease list. See New York State Soc. of Surgeons v. Axelrod, 157 A.D.2d 54, 555 N.Y.S.2d 911, affirmed 77 N.Y. 677, 569 N.Y.S.2d 922, 572 N.E.2d 605 (Ct. Of Appeals, 1991).

It is significant that the Supreme Court of the State of New York, Appellate Division: First Department's decision dated April 25, 1995, affirmed the dismissal of Petitioner's seventh cause of action which alleged a violation of Public Health Law § 2307 **Venereal disease; person knowing himself to be infected**. It stated, in

pertinent part, at page 10: "While the Public Health Law does not define the term venereal disease, it clearly...excludes HIV infection from that category. Suffice to say that under Public Health Law there are entirely separate statutory schemes for HIV [infection]..."(emphasis added). See Plaza v. Wisser, 211 A.D.2d 111 (1st Dept., 1995).

Furthermore, because of the separate statutory construction afforded to AIDS and HIV infection, the Supreme Court, Appellate Division, First Department, in Plaza v. Wisser, 211 A.D.2d 111 (1st Dept., 1995), not only acknowledged that AIDS and HIV are not communicable or sexually transmissible diseases under New York law, but it is significantly instructive that, it determined that AIDS and HIV disease are also not included within the purview of PHL **§ 2307. Venereal disease; person knowing himself to be infected** because "the legislature clearly intended to exclude AIDS and HIV from the list of communicable and sexually transmitted diseases as evidenced by the fact that "there are two separate statutory schemes for AIDS and HIV." Id. at 10.

Although AIDS and HIV disease, from the point of view of infectious disease specialist physicians, are communicable and sexually transmissible diseases, New York has decided, by public health law, that they are not.

Unquestionably, on the one hand, the term "communicable disease" includes within its purview, all diseases that are "capable of being transmitted" embracing AIDS, HIV infection, and HIV disease. On the other hand, the term "communicable disease" excludes AIDS, HIV infection, and HIV disease.

Clearly, the gravamen of Plaza's claims against Estate do not lie squarely with the exclusionary endoresements set forth in the insured's homeowner's policy disclaiming coverage for communicable diseases since AIDS and HIV disease are not communicable diseases under New York law. Hence, General Accident should have defended the action and indemnified petitioner, as assignee of the defendant Estate against the allegations in Petitioner's complaint.

Thus, the term "communicable disease", standing alone, is

subject to two completely antithetical interpretations rendering the term ambiguous.

B. Under New York Law, An Insurer Has The Burden Of Proving That A Term In Its Exclusionary Clause Is Subject To No Other Reasonable Interpretation.

Under New York law, the insurer has the burden of proving that a term in its exclusionary clause is subject to no other reasonable interpretation. See Continental Cas. Co. v. Rapid-American Corp., 80 N.Y.2d 640, 593 N.Y.S.2d 966, 609 N.E.2d 506 cited in MCKINNEY'S CONSOLIDATED LAWS OF NEW YORK ANNOTATED, INSURANCE LAW § 3420, 1997 Cummulative Annual Pocket Part, Notes of Decisions, at 215. In Continental, the insured's claim was for asbestos injuries. The insurer's liability exclusionary clause precluded coverage for injuries that arose out of contamination of air rather than through direct contact. Id. The Court held that, since asbestos injures could occur in a variety of ways, only one of which was potentially excluded from coverage, the insurer could not meet its heavy burden of proving that the exclusion applied in the particular case and that it was subject to no other reasonable interpretation. Id.

In the instant case, since Petitioner's injuries arose out of the transmission of the AIDS virus, General Accident has the heavy burden of proving that its Communicable Disease Exclusionary Endorsements, is subject to no other reasonable interpretation . Id.

Petitioner contends that General Accident cannot demonstrate that the term "communicable disease" is not subject to another reasonable interpretation because the term "communicable disease" is, indeed, subject to two equally reasonable interpretations.

C. Where A Term In An Insurance Policy Exclusionary Endorsement Is Subject To Two Or More Constructions, The Insurer Has The Burden Of Proving That Its Own Construction Of The Term, Rather Than The Insured's Construction Of The Term, Is The *Only* Construction That Can Fairly Be Placed On Such Words And Expressions.

Under New York law, an insurer has the burden of proving that its own construction of the terms in a policy's exclusionary endorsements, rather than the insured's construction of those same terms in a policy's exclusionary endorsements, is the only construction that can fairly be placed on such words and expressions. See American Fidelity Fire Ins. Co. v. Pardo, 70 A.D.2d 536, 299 N.Y.S.2d 521 (1969), cited in MCKINNEY'S CONSOLIDATED LAWS OF NEW YORK ANNOTATED, INSURANCE LAW, 1995 Notes of Decisions, at 519 (1985); Vito v. General Mutual In. Co., 15 A.D.2d 289, 223 N.Y.S.2d 431 Id. See also Continental Cas. Co. v. Rapid-American Corp., 80 N.Y.2d 640, 593 N.Y.S.2d 966, 609 N.E.2d 506 cited in MCKINNEY'S CONSOLIDATED LAWS OF NEW YORK ANNOTATED, INSURANCE LAW, § 3420 1997 Cummulative Annual Pocket Part, Notes of Decisions, at 215.

General Accident cannot demonstrate that its own construction of the term "communicable disease", and not the insured's construction of the term, is the ***only*** construction of the exclusionary term that can fairly be placed on such words and expression.

There is another reasonable interpretation. AIDS, HIV infection and HIV disease, are not a communicable disease under New York law. Consequently, another reasonable construction is that, an exclusionary endorsement excluding coverage for a "communicable disease" in a personal liability section of a policy, is inapplicable to personal injuries arising out of the negligent transmission of HIV by an insured since AIDS and HIV disease are excluded from the list of communicable and sexually transmissible diseases under New York law.

D. A Reasonable Person Living In New York State And In Particular, New York City, Would Have Been Exceedingly Justified In Concluding, Absent Clear And Unambiguous Language To The Contrary, That Personal Injury Causes Of Action That Arise Out Of The Negligent Transmission Of The Virus That Causes AIDS, Was Excepted From General Accident's Communicable Disease Exclusionary Endorsement.

The Appellate Court, ruled that, because AIDS and HIV are *medically*, communicable diseases, it must be that the plain and ordinary meaning of the terms to the average insured is also that AIDS and HIV are *medically*, "communicable diseases" and the average insured would construe the Communicable Disease Exclusionary Endorsement to include within its purview, AIDS and HIV.

However, this reasoning requires that the average insured knows, should know, or has reason to know, that where there is a legal and medical conflict, the medical construction will prevail when interpreting exclusionary endorsements in a homeowner's personal liability policy.

This reasoning requires that the average insured knows, should know, or has reason to know, that the special antidiscriminatory protections under New York Education, Health, Employment, Housing, and even Insurance Law, afforded to persons afflicted with, or is perceived to be afflicted with, the virus that causes AIDS, do not apply to exclusionary endorsements in homeowner's personal liability insurance policies.

This reasoning requires that the average insured knew, should have known, or had reason to know, at the time the policy was issued, that HIV infection was a communicable "disease" at all stages of infection notwithstanding that the infected person had no outward symptoms or manifestations of any disease, at the time that the insured herein took out the policy in issue.

It is respectfully submitted that because of the special protections afforded to HIV infected persons under New York Law,

the average insured living in New York State and especially New York City, would not have known that AIDS and HIV were automatically included in an exclusionary endorsement such as the one in issue herein.

Any reasonably informed insured living in New York State , and particularly, New York City, would be exceedingly justified in concluding, absent clear and unambiguous language to the contrary, especially in light of the prominently well-known protections afforded to persons who may be afflicted with the AIDS virus, by New York State's dual statutory scheme, excluding AIDS, HIV infection, and HIV disease from the communciable disease list, that a communicable disease exclusionary endorsement in a homeowner's personaly laibility insurance policy, was not applicable to a claim for personal injuries that arise out of the negligent tranmsission of the deadly AIDS virus.

During the years that the insured's said insurance policy was in full force and effect, various arms of the State and City governments, including the public schools, as well as, public and private organizations and agencies, embarked upon massive educational campaigns to stop the spread of AIDS and HIV by encouraging people to voluntarily come forward to be anonymously tested for the presence of the AIDS virus without having to worry about recriminatory or discriminatory ramifications from family, friends, employers, landlords, etc., and be counselled how to prevent the transmission and contraction of the AIDS virus. It would have been hard to find anyone living in New York City who had not heard of the disease or the special protections afforded to persons who wanted to know their HIV status.

Under these circumstances, any reasonably informed insured, living in New York State, and particularly, New York City, would be exceedingly justified in concluding that a communicable disease exclusionary endorsement in a homeowner's personal liability policy provides coverage for personal injuries that arise out of the negligent transmission of the AIDS virus.

E. Once The Legislature Excluded AIDS And HIV Infection From The List Of Communicable And Sexually Transmissible Diseases, It Was Incumbent Upon General Accident To State In Clear, Unambiguous Language, Which Was Incapable Of Any Other Meaning, That An Exclusionary Endorsement In Its Homeowner's Personal Liability Insurance Policy Does Not Provide Coverage For Personal Injuries That Arise Out Of The Transmission Of AIDS And HIV Infection By The Insured.

In 24 Envtl. L. Rep. 21,215 STATE OF NEW YORK, v.Walter T. BLANK and Abalene Pest Control Service, Inc., and Orkin ExterminatingCompany, Inc., Nos. 1092-1094, Dockets 93-7952, 93-9002 and 93-9004 (U. S. Ct Appeals, Second Cir. June 13, 1994), the Court said, in discussion pollution exclusion clauses, "It is well settled that "[e]xclusions from insurance policy coverage are given strict constructions." Id. citing Kimmins Indus. Serv. Corp. v. Reliance Ins. Co., 19 F.3d 78, 81 (2d Cir.1994). In addition, "[e]xclusionary clauses are given the interpretation most beneficial to the insured (emphasis added)." See M.H. Lipiner & Son, Inc. v. Hanover Ins. Co., 869 F.2d 685, 687 (2d Cir.1989). Further, the insurer bears the burden of proving that an exclusion applies. See Continental Casualty Co. v. Rapid-American Corp., 80 N.Y.2d 640, 654, 593 N.Y.S.2d 966, 973, 609 N.E.2d 506, 513 (1993) ("Where contamination could occur in a variety of ways, only one of which is potentially excluded, [the insurer] cannot meet the heavy burden of showing that the exclusion applies in the particular case and is subject to no other reasonable interpretation"); see also McCormick & Co., Inc. v. Empire Ins. Group, 878 F.2d 27, 30 (2d Cir.1989) ("Once the insured shows that a [covered] loss has occurred, the insurer shoulders the burden of demonstrating that the loss claimed is excluded expressly from coverage under the policy terms"). This burden is heavy. See Id. This is especially so when the insurer is seeking to avoid the duty to defend. See Seaboard Sur. Co. v. Gillette Co., 64 N.Y.2d 304, 310, 486 N.Y.S.2d 873, 876, 476 N.E.2d 272, 275 (1984) (an insurer's duty to defend "is broader than its obligation to indemnify").

To avoid an obligation to defend an action against an insured on the ground that an exclusion clause applies, the insurer must demonstrate that there is no reasonable possibility of coverage under the policy. That is, "an insurer must establish that the exclusion is stated in clear and unmistakable language, is subject to no other reasonable interpretation, and applies in the particular case." See Continental Casualty, 80 N.Y.2d at 652, 593 N.Y.S.2d at 972, 609 N.E.2d at 512.

Here, at the time that the policy was first issued to Wisser, the New York State legislature had already enacted PHL § 2311 and § 2307. Since HIV transmission can occur in a variety of ways, it is respectfully submitted that it was probably the intent of the respondent, General Accident, to exclude coverage only for those personal injury causes of action that allege *actual* transmission of, or *actual* exposure to the virus which could result in actual transmission of, the deadly virus by the insured but not causes of action that allege *indirect* transmission of the virus by negligent acts of the insured such as in Playford, or feared transmission of the AIDS virus, or HIV discrimination against HIV positive or perceived to be positive plaintiffs by the insured in employment, public accommodations, education, housing, health and hospital insurance, etc.

As in Continental Casualty Co. v. Rapid-American Corp., 80 N.Y.2d 640, 654, 593 N.Y.S.2d 966, 973, 609 N.E.2d 506, 513 (1993), since HIV transmission could occur in a variety of ways, only one of which is probably potentially excluded, respondent, General Accident, as the Insurer, cannot meet the heavy burden of showing that the exclusion applies in the particular case and is subject to no other reasonable interpretation, the term must be deemed ambiguous. Id.

General Accident failed to write any delimiting phraseology narrowing its exclusionary term "communicable diseases", this Court should grant review of this case to determine if, pursuant to the antithetical usages of the term "communicable diseases" under New York law; and the further ambiguities as pointed out by the Pennsylvania Court of Appeals in 12th Street Gym, Inc. V. General Star Indemnity Company, 1996 WL 489230 (Aug. 28, 1996, 3rd Cir.

(Pa.)), that General Accident had an obligation to defend and/or indemnify the Estate for the wrongful transmission of the AIDS virus by Scott Allen Wisser to petitioner.

Where, as here, there are two possible antithetical definitions of a term in a policy's exclusionary endoresements, it is incumbent upon an insurer to define or specify which definition governs. See McCarthy v. New York Property Ins. Underwriting Ass'n, 158 A.D.2d 961, 551 N.Y.S.2d 120 (1990).

In light of this ambiguity and the advent of AIDS, petitioner argues that respondent, General Accident, had an affirmative obligation to define the term "communicable disease" in its exclusionary endorsement, which description of the term "communicable disease" as it relates to AIDS or HIV infection governed, whether New York Public Health Law governed or whether the medical definition of the term governed, and by failing to do so, failed to comply with the ADA by effectively denying a person with a disabilitiy, the ability to obtain compensation for his personal injuries.

It is contended that General Accident had an affirmative duty to be highly specific, and be subject to no other interpretation, as to what was included within the purview of the homeowner's policy's personal liability "communicable diseases" exclusion if it did not want to cover AIDS, HIV infection, and HIV disease. It should have, by way of example, and certainly not be limitation:

1. Declared that the exclusion for "personal injuries that arise out of the transmission of a Communicable Disease" by the insured includes within its purview AIDS, symptomatic HIV and asymptomatic HIV notwithstanding that it is exempted from the communicable and sexually transmissible disease lists under New York State Public Health Law.

2. Declared that the exclusion for "communicable diseases" includes within its purview AIDS and HIV disease or infection actual contraction, or actual exposure via sexual activity, I.V. drug use, contamminated blood transfusion, accidental needle prick, or any other means whereby the AIDS virus can possibly be transmitted;

3. Declared that the exclusion for "communicable

diseases" includes within its purview the Centers For Disease Control's definition of AIDS;

4. Declared whether or not PHL §2311, PHL §2307, PHL § 225(5)(h), or 10 NYCCRR 2.1 were inapplicable to its policy.

F. Despite Federal And State Case Law Precedent, The New York State Court Of Last Resort, In Allowing The Intermediate Appellate Court Decision To Stand, Has So Far Departed From The Accepted And Usual Course Of Judicial Proceedings, As To Call For An Exercise Of This Court's Supervisory Power.

Since it is beyond cavil that the foregoing rules respecting federal and state insurance law are well established by case precedent, the fact that the New York State Court of last resort, in allowing the intermediate Appellate Court decision to stand, has so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's supervisory power. See Rule 10 S. Ct.

G. Neither Bragdon v. Abbott, the ADA, Society of Surgeons v. Axelrod, Mandates That AIDS And HIV Must Be 'Communicable Diseases' For All Purposes.

This Court's decision in Bragdon v. Abbott, 118 S.Ct. 1206 (Mar. 9, 1998), held that persons who are HIV positive or perceived to be HIV positive, are disabled within the meaning of the ADA at all stages of the disease. However, this Court did not hold that merely because persons who are infected with HIV or perceived to be, are disabled within the meaning of the ADA, HIV must be a communicable disease for all purposes. Nor does the ADA mandate that, because a person is disabled by reason of having a 'communicable disease' or perceived to have a 'communicable disease', that means he must be disabled for all purposes. Finally, the New York State decision in Soc. of Surgeons v. Axelrod, 157 A.D.2d 54, 555 N.Y.S.2d 911, affirmed 77 N.Y. 677, 569 N.Y.S.2d

922, 572 N.E.2d 605 (Ct. Of Appeals, 1991) does not mandate that AIDS and HIV must be 'communicable diseases' for all other purposes except public health policy concerns.

Therefore, there is no barrier to this Court finding that General Accident's 'communicable disease' exclusionary endorsement was ambiguous for being overly broad and ambiguous because the definition of 'communicable disease' was subject to two reasonable antithetical constructions under New York Law and therefore, is a violation of the ADA.

CONCLUSION

This Court should consider review of this Writ of Certiorari respecting this insurance question that has not been, but should be, decided by this Court because, if the intermediate Appellate Court decision, if allowed to stand, will have a discriminatory effect upon certain persons with disabilities, rendering it violative of the ADA and the 14th Amendment to the U.S. Constitution. Moreover, the decision is contrary to established decisional federal, New York State, and other state decisional law law.

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APPENDIX

Order, State Of New York Court of Appeals
Dated and Entered : August 31, 1998

State of New York,
Court at Appeals

At a session of the Court, held at Court of Appeals Hall in thc City of Albany

on the thirty-first day
of August, 1998

Present, HON.JUDITH S.KAYE, *Chief Judge, presiding.*

Mo. No. 1015

Jose Manuel Plaza, &c.,
Appellant,

v.

The General Assurance Company, &c.,
Respondent.

A motion for reargument of motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with one hundred dollars costs and necessary reproduction disbursements.

"S/ Stuart M. Cohen."

Stuart M. Cohen
Clerk of the Court

Order, State Of New York Court of Appeals
Dated and Entered : July 7, 1998

State of New York,
Court at Appeals

At a session of the Court, held at Court of Appeals Hall in thc City of Albany
on the seventh day
of July, 1998

Present, HON.JUDITH S.KAYE, *Chief Judge, presiding.*

1-10 Mo. No. 565
Jose Manuel Plaza, &c.,
Appellant,
v.
The General Assurance Company, &c.,
Respondent.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with one hundred dollars costs and necessary reproduction disbursements.

"S/ Stuart M. Cohen."

Stuart M. Cohen
Clerk of the Court

Order, Appellate Division, First Department,
Dated March 5, 1998 and Entered : March 11, 1998

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on March 5, 1998.

Justice Presiding,

Present: Hon. E. Leo Milonas,
Betty Weinberg Ellerin
Israel Rubin
Peter Tom, Justices.

---X

Jose Manuel Plaza, etc.,

Plaintiff-Appellant,

- against -

M-7988
Index No. 104878/96

The General Assurance Company, etc.,

Defendant-Respondent.

---X

Plaintiff-appellant having moved for reargument of, or in the alternative, for leave to appeal to the Court of Appeals from, the decision and order of this Court entered on November 20, 1997 (Appeal No. 62074),

NOW, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon, it is

ORDERED that the motion be and the same hereby is denied in its entirety.

ENTER:

"S/ Catherine O'Hagan Wolfe"

Clerk

Order, Appellate Division, First Department,
Dated and Entered : November 20, 1997

Appeal No. 62074

Murphy, P.J., Milonas, Ellerin, Rubin, Tom, JJ.

62074 Jose Manuel Plaza, etc.,
Plaintiff-Appellant,

Richard T. Sinrod

-against -

The General Assurance Company, etc.,
Defendant-Respondent.

Roy W. Vasile

Order, Supreme Court, New York County (Carol Huff, J.), entered May 14, 1997, which granted defendant insurer's cross motion for summary judgment declaring that it had no obligation to defend plaintiff's assignor, an estate, under a homeowner's policy it issued to the decedent, or to indemnify plaintiff under the settlement he entered into with the estate, unanimously affirmed, without costs.

The subject policy's exclusion of coverage for bodily injury arising out of the transmission of a "communicable disease" by an insured is neither ambiguous nor unduly broad, and thus defendant insurer had no duty to defend and indemnify plaintiff's action for personal injuries sustained as a result of the transmission of the HIV infection to him by the insured. The fact that the Public Health Law excludes AIDS, HIV infection, and HIV disease from its list of communicable diseases is not to suggest that such diseases are noncommunicable (Matter of New York Socy. of Surgeons v Axelrod, 77 NY2d 677, 682). The policy reasons for excluding AIDS and HIV from the lists of communicable and sexually transmissible diseases were fully discussed in the Societv of Surgeons case (supra), and it is clear that those reasons have nothing to do with the average

person's common-sense understanding of the term "communicable disease". While it is true that the term "communicable disease" could include a communicable disease that is not transmitted by sexual contact, and, in fact, includes any disease that is communicable, that alone does not render the exclusion unduly broad, invalid or inapplicable herein. We have considered plaintiff's other contentions and find them to be without merit.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 20, 1997

"S/Catherine O'Hagan Wolfe"

CLERK

Order, Hon. Carol E. Huff, dated April 14, 1997
Index No. 104878/96

SUPREME OF THE STATE OF NEW YORK twl
COUNTY OF NEW YORK; IAS PART 32

JOSE MANUEL PLAZA a/k/a JOSE EMANUEL PLAZA,: a/k/a MANUEL PLAZA, a/k/a, EMANUEL PLAZA, Individually, and As Assignee of THE ESTATE OF : SCOTT *ALLEN* WISSER, Deceascd and *As* Assignee of HAROLD LLOYD WISSER and FERN VIOLA WISSER,: Co-Administrators of THE ESTATE OF SCOTT ALLEN WISSER, Deceased, :

Plaintiffs, NEW YORK

- against - COUNTY

CLERK'S

THE GENERAL ASSURANCE COMPANY, a/k/a, : OFFICE
THE GENERAL ACCIDENT INSURANCE COMPANY, MAY 14,1997

Defendants. :

CAROL E. HUFF, J.:

Plaintiff Jose Manuel Plaza moves for an order pursuant to CPLR 3212 for summary judgment declaring that defendant The General Assurance Company ("General") is obligated to defend the Estate of Scott Allen Wisser under a homeowner's policy issued by defendant and to indemnify plaintiff under the settlement he entered into with the Estate. Defendant cross-moves for an order granting summary judgment declaring that it has no such obligations.

In February, 1989, General issued homeowners policy number HP 4533733 D3 (the "Policy") to Scott Allen Wisser covering and insuring a condominium apartment, No. 803, located at 2 Cornelia

Street. New York, New York. Under the Policy, defendant would indemnify its insured against loss or damage occasioned by his personal liability. The Policy was renewed yearly until Wisser's death on December I 7, 1992.

In August, 1986, plaintiff met Scott Allen Hisser and about two months later moved in with him. They commenced a relationship, which continued until Wisser's death from AIDS redated complications.

In February, 1993, plaintiff tested positive for HIV. Plaza commenced a lawsuit against Wisser's Estate for negligent, deliberate and fraudulent conduct in causing HIV to be transmitted to him. He also sued Wisser's parents in their individual capacity for intentional inflection of emotional distress, a fraudulent conveyance in violation of the Debtor and Creditor Law, breach of contract and anticipatory breach of contract.

By letter dated December 5, 1993, plaintiff demanded that defendant extend him coverage -under the Policy and that the insurer undertake a defense of the Estate in Plaza's action. The next day by speedmemo to counsel for the Estate, defendant disclaimed coverage under the communicable disease exclusion.

On December 23, 1993, The Estate and the Wissers' motion to dismiss Plaza's complaint was granted. Plaza filed an appeal to the Appellate Division challenging the dismissal, and notified General of his intention to appeal, by letter dated January 18, 1994. Once again, General disclaimed coverage, premised upon the communicable disease exclusion, H-325 endorsement, and also because of "fraudulent concealment or misrepresentation" of acts that are "expected or intended by the insured."

The Appellate Division reinstated the second, third, fifth and sixth causes of action of Plaza's complaint (Plaza v Estate of Wisser, 214 AD2d 439). Following the Appellate Diviison decision Plaza and the Estate commenced settlement talks. General was notified of the negotiations and given an opportunity to participate prior to finalization of the settlement.

Defendant declined to participate. The negotiations culminated in a settlement under which the Estate agreed to pay Plaza $159,000

and assigned to Plaza the Estate's claims against the insurance carrier under the Policy.

Thereafter, Plaza commenced this suit for a judgment declaring that General was obligated to defend the Estate and to indemnify plaintiff on the claim assigned. Defendant responded denying coverage and asserting that under the Policy there is no duty to defend nor indemniify.

The policy provides coverage for an "occurrence" that results in "bodily injury' occurring at the "insured location". An "occurrence" is defined in Section 5 of the policy as "an accident, including continuous or repeated exposure to the same general harmful conditions, which results during the policy period in a) "bodily injury". Bodily injury?' is defined as "bodily hann, sickness or disease". The "insured location" means the "residence premises".

Plaintiff alleges that he suffered a bodily injury from repeated exposure to AIDS at the residence of the insured that resulted in his contracting the disease, and that therefore, the claim falls within the arnbit of the Policy so that General must defend and indemnify for the conduct of its insured.

Defendant contends that the claims in the underlying action are excluded from coverage under the Policy's exclusionary endorsements. Specifically, defendant urges that endorsement HO-325, which excludes coverage for bodily injury which arises out of the transmission of a communicable disease by an insured requires a declaration in its favor concerning the first seven causes of action, premised on the insured Wisser's infecting plaintiff with the AIDS virus. Plaintiff maintains that the exlcusion is ambiguous and must be construed against the insurer because Public Health Law ("PHL") Sections 225(5)(h) and 2311 do not list REV or AIDS as a communicable disease or sexually transmissible disease. Defendant counters that the Court of Appeals has clearlyrecognized that both AIDS and HIV are communicable diseases, that the PHL §§ 225(5)(h) and 2311 were not intended to be an exhaustive list of communicable diseases, but rather a group of diseases that for public policy reasons require a certain kind of reporting and treatment.

An insurer has the burden of providing that the definition in its exclusionary clause is subject to no other plausible interpretation than the one it sets forth, LContinental Casualty Company v. Rapid American Corp., 80 NY2d 640). The terms of an insurance policy shall be given their plain and ordinary meaning, (Government Employees Insurance Company v. Kligler. 42 NY2d 863), and ambiguities in language will not be found where none exist. (Breed v. Insurance Companv of North America. 46 NY2d 351 rears. den. 46 NY2d 940).

New York Public Health Law Section 2(1) defines a "communicable disease" as an infectious, contagious or communicable disease". Both Webster's Dictionary (Lexicon Publications, 1988) and Stedman's Medical Dictionary (Williams & Wilkins, 24ed. 1982) define communicable as "capable of being communicated or transmitted." Plaintiff s original complaint is predicated upn the fact that AIDS and HIV were transmitted from Wisser to plaintiff es a consequence of their high risk sexual practices.

In Doe v. Coughlin, 71 NY2d 48, 57 the Court of Appeals "recognized that the State has a substantial interest in preventing the transmission and spread of communicable diseases (citations omitted). Acquired Immune Deficiency Syndrome is such a disease." Again in New York State Societv of Surgeons v. Axelrod, 77 NY2d 677, the Court of Appeals stated that "HIV infection is a communicable disease" despite its absence from the list of communicable diseases under Public Health Law Sections 225(5)(h) and 2311. The Health Department's determination not to place AIDS or HIV on the list of communicable or sexually transmissable diseases was a public policy decision within the agency's discretion (Id.) The Court of Appeals found that the Public Health law list was not required to be exhaustive and that the term communicable disease is broader than the enumerated list.

Plaintiff contention that defendant wants the Court to read communicable disease narrowly as a medical definition while the legal definition in New York does not include it, is inapposite. Defendant's reading of the term observes the plain and ordinary

definition of communicable disease and is in accord with the Court of Appeals. The Public Health Law list is a list, it is not a definition of communicable diseases. Moreover,,ihe list is clearly not exhaustive and depends upon the Cornnussioner of Health's view of public policy considerations. (Id.)

Plaintiff by use of the expedient of the list tries to transmute the ordinary and plain meaning of the term by utilizing a bureacratic fiction to subvert the definition. The Court should refrain from rewriting insurance contracts where the terms are clear and unambiguous. (United States Fidelitv and Guaranty Company v. Annunziata 67 NY2d 299). Where the only reasonable construction is favorable to the drafter of the policy, there should be no reluctance to follow the insurer's interpretation, (Loblan Inc v. Employer's Liability Assurance Corp., 57 NY2d 872). Accordingly, the first seven causes of action in the original underlying complaint fall within this exclusion and are not covered.

The remaining causes of action in the underlying complaint are brought against Wisser's parents in their individual capacities. The elder Wissers are not insureds under the Policy and have no standing to seek coverage thereunder, (D'Amico v. Pennsylvania Millers Mutual insurance Company, 52 NY2d 100).

In light of the foregoing, the Court does not reach defendant's arguments that the Policy excluded the insured's fraudulent, intentional and wilful conduct or that of this parents.

Accordingly, the motion by plaintiFFfor summary judgment is denied and the cross-motion by defendant is granted and it is ordcrcd, adjudged and declared that General is not obligated to defend and indemnify the claims under the Policy.

This constitutes the decision. order and judgment of the Court.

Dated: APR 14 1997

"S/ CAROL E. HUFF"

CAROL E. HUFF
J.S.C.

Clerk's signature appears

Clerk

NEW YORK
COUNTY CLERK'S OFFICE
MAY 14, 1997

FILED

Supreme Court, U.S.
FILED
DEC 23 1998
OFFICE OF THE CLERK

No. 98-902

IN THE

Supreme Court of the United States

October Term 1998

JOSE MANUEL PLAZA a.k.a., JOSE MANUEL PLAZA, a.k.a. MANUEL PLAZA, a.k.a. EMANUEL PLAZA, Individually and As Assignee of THE ESTATE OF SCOTT ALLEN WISSER, Deceased and As Assignee of HAROLD LLOYD WISSER and FERN VIOLA WISSER, Co-Administrators of THE ESTATE OF SCOTT ALLEN WISSER, Deceased,

Petitioner,

-v.-

THE GENERAL ACCIDENT COMPANY a.k.a. THE GENERAL ACCIDENT INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The decisions and judgment reached by the New York State Supreme Court, the Appellate Division, First Department and the New York Court of Appeals were proper such that there is no call for an exercise of this Court's power. The questions presented are:

1. Whether Respondent's insurance policy clearly and unambiguously excludes coverage for a bodily injury claim arising out of the transmission of a communicable disease by an insured.

2. Whether the courts below properly concluded that under settled principles of New York law, the "communicable disease" exclusion contained in a policy of homeowner's insurance issued by Respondent to its insured, relieved Respondent of any duty to defend or indemnify him in an action brought by Petitioner to recover damages for injuries sustained when the AIDS virus was transmitted to him by Respondent's insured.

RULE 29.6 STATEMENT

Respondent GENERAL ASSURANCE COMPANY is a duly organized insurance company and is a member of the GENERAL ACCIDENT GROUP.

In addition to GENERAL ASSURANCE COMPANY, the GROUP consists of the following companies:

General Accident Insurance Company of America
General Accident Insurance Company of New York
Potomac Insurance Company of Illinois
Camden Fire Insurance Company
Pennsylvania General Insurance Company
PG Insurance Company of New York

The GENERAL ACCIDENT companies have finalized a merger with COMMERCIAL UNION ASSURANCE COMPANY, which, upon information and belief, is an English stock company. The merged company is known as CGU Insurance.

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STATEMENT OF THE CASE

This coverage dispute centers around the interpretation and applicability of certain exclusionary language set forth in a common homeowners' insurance contract. The trial court determined that the pertinent language unambiguously excluded coverage for the injury claims made by Petitioner, and this determination was affirmed by the Appellate Division, First Department, of the Supreme Court of the State of New York. The New York Court of Appeals subsequently denied leave to appeal and adhered to that determination on reargument.

This declaratory judgment action was brought by Petitioner in order to secure coverage under Respondent's policy for injuries sustained by him as a result of having been infected with the AIDS virus by Respondent's insured. [1] Respondent had denied coverage for this claim on the basis of a policy endorsement which excluded coverage for any "bodily injury ... which arises out of the transmission of a communicable disease by an insured." (R. 310).

Petitioner had argued at nisi prius that the term "communicable disease" had both a medical definition and a legal definition, and that the narrower legal definition did not include AIDS and HIV within its scope. Petitioner thus urged the court to find that the policy's exclusion was necessarily ambiguous because it did not specify that the term was intended to be used in its broader "medical" sense. (R. 16-17).

This argument was rejected by the trial court, which held that the term "communicable disease" had only one reasonable

---

[1] See amended complaint set forth at R. 221 et seq. Petitioner had also sued the parents of Respondent's insured, but has since abandoned any argument with respect to coverage for that aspect of the underlying lawsuit.

meaning. (R. 18). The court thus enforced the plain language of the exclusionary endorsement and entered judgment declaring that Respondent owed no duty to defend or indemnify its insured for Petitioner's underlying bodily injury claims.

On appeal to the Appellate Division, and in his motion to the Court of Appeals, Petitioner expanded this argument by urging that since he was asymptomatic, the mere fact that he was HIV-positive did not mean that he had a "disease." [2] This contention was properly rejected by the appellate courts below, and thus they affirmed the finding that Respondent's communicable disease exclusion was neither ambiguous nor unduly broad.

Petitioner now seeks to add a constitutional dimension to this otherwise straightforward case of contract interpretation. Having utterly failed to dissuade the lower courts from applying time-honored principles of contract law to the issues presented in this declaratory judgment action, Petitioner now suggests that those very principles should be abandoned because they may produce disparate results depending on the specific facts of any given case.

Respondent disputes the premise of Petitioner's argument: differing facts should produce disparate results, so long as the rule of law is uniformly applied. The fact that some HIV victims might find coverage for their plight under different factual settings does not mean that this Petitioner is entitled to the same result under the facts of this case.

In short, Respondent urges this Court to reject the notion that federal law is offended by the traditional rules governing the

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[2] Petitioner has now apparently changed his position on this argument, conceding that even an asymptomatic HIV infection is still a "disease." See Bragdon v. Abbott, 118 S. Ct. 1206 (1998).

construction and interpretation of the terms of an insurance contract.

ARGUMENT

POINT I: RESPONDENT'S POLICY PROPERLY EXCLUDES COVERAGE FOR ANY CLAIM FOR BODILY INJURY ARISING OUT OF THE TRANSMISSION OF A COMMUNICABLE DISEASE.

Petitioner's opening Points of argument are predicated on the erroneous concept that Respondent's "communicable disease" exclusion somehow singles out AIDS victims. Nothing can be farther from the truth.

The exclusionary endorsement at issue was reproduced at page 310 of the Record on Appeal to the courts below. The exclusion provides:

> " Coverage E - Personal Liability and Coverage F - Medical Payments to others, do not apply to bodily injury or property damage which arises out of the transmission of a communicable disease by an insured."

Since the policy does not specifically define the terms of the exclusion, they are to be accorded their plain and ordinary meaning. Government Employees Insurance Company v. Kligler, 42 N.Y.2d 863, 397 N.Y.S.2d 777 (1977). Under New York law, the courts must refrain from re-writing an insurance agreement where its terms are clear and unambiguous. United States Fidelity and Guaranty Company v. Annunziata, 67 N.Y.2d 299, 501 N.Y.S.2d 790 (1986).

There is no suggestion in the plain words of Respondent's exclusion that one type of communicable disease is treated any

differently from another. So long as any "communicable disease" is transmitted from an insured to another, there is no coverage afforded by the policy.

Petitioner attempts to illustrate a discriminatory component to Respondent's exclusionary endorsement by citing to Playford v. Phelps Memorial Hospital Center, ___ A.D.2d ___, QDS: 16103405 (2d Dept. 1998). [3] Although that case has nothing to do with insurance coverage, Petitioner suggests that the plaintiff in that case might not have secured coverage for her claims under Respondent's endorsement since her claim "arose out of the transmission of a communicable disease."

This attempted illustration actually proves Respondent's argument. Petitioner has effectively conceded that if a communicable disease is transmitted by an insured, Respondent's exclusion would bar coverage for the bodily injury claim. Conversely, if the disease was transmitted by some means other than "by an insured", there would be coverage since the exclusion would not apply.

Respondent's policy does not mislead or discriminate in its scope: the plain words of the exclusion clearly and unambiguously preclude coverage for "bodily injury" sustained as a result of the "transmission" of any communicable disease "by an insured."

In affirming the principle that the words of an insurance contract are to be given their plain and ordinary meaning, the courts below neither offended the Fourteenth Amendment nor

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[3] This appellate decision has not been published in the advance sheets as of the date this brief was drafted. However, the decision reverses the trial court's denial of the defendant's motion to dismiss on statute of limitations grounds, which was published at 174 Misc.2d 796, 665 N.Y.S.2d 1017 (Westchester Co. 1997).

violated the letter, spirit or purpose of the Americans with Disabilities Act (42 USC §§12101 et seq.).

It borders on absurdity to suggest that the courts below violated the Americans with Disabilities Act by performing their function as courts of law. Moreover, their approval of the insurance policy endorsement at issue can hardly confer a "public" component to a private insurance contract for the purposes of subjecting its terms to scrutiny under the requirements of the Act.

Similarly, the speculative assertion that some HIV-related injuries might be covered by Respondent's policy, while others might not, is woefully insufficient to infer, much less establish, a "disparate impact" claim. Compare Lopez v. Metropolitan Life Insurance Company, 930 F.2d 157 (2d Cir. 1991) (discussing the requisite elements of such a claim in the employment context).

In short, there is no constitutional dimension to this case which warrants the time or attention of this Honorable Court.

POINT II: THE COURTS BELOW CORRECTLY INTERPRETED THE TERMS OF RESPONDENT'S POLICY IN ACCORDANCE WITH SETTLED PRINCIPLES OF STATE LAW.

Petitioner devotes the remaining Points of his brief to a repetition of the arguments raised at nisi prius and on appeal.

The fundamental premise of Petitioner's analysis is that there are different connotations to the term "communicable disease" which render the term necessarily ambiguous. Petitioner contends that since AIDS and HIV are excluded from the "communicable disease" list promulgated pursuant to New York

Public Health Law §225(5)(h), these afflictions are "legally" excluded as communicable diseases.

The courts below correctly recognized that the "communicable disease" list promulgated by the Commissioner of Health pursuant to New York's Public Health Law was not intended to provide a definitional "limitation" on communicable diseases. A disease can still be communicable even though it is not included on the Public Health Law list. New York State Society of Surgeons v. Axelrod, 77 N.Y.2d 677, 569 N.Y.S.2d 922 (1991).

AIDS and HIV are communicable diseases. New York State Society of Surgeons v. Axelrod, supra; Doe v. Coughlin, 71 N.Y.2d 48, 523 N.Y.S.2d 782 (1987). Whether asymptomatic or not, these afflictions are unquestionably "diseases" from the moment of infection. See Bragdon v. Abbott, 118 S. Ct. 1206 (1998).

The courts below correctly recognized that the public policy reasons for excluding AIDS and HIV infection rom the list of communicable diseases have nothing to do with a common-sense understanding of the term. "Placement of any disease on the communicable or sexually transmitted disease lists triggers statutory provisions . . . which, for public health reasons, may not be appropriate in dealing with every type of communicable or sexually transmissible disease." New York State Society of Surgeons v. Axelrod, supra at 925.

As the Appellate Division correctly recognized, the "average person's common-sense understanding of the term" requires the conclusion that AIDS and HIV infection are communicable diseases. In a slightly different but entirely analogous context, the New York Court of Appeals has stated that commonly used terms should be construed in accordance with the understanding of the average person ". . . who, of

course, relates [the term] to the factual context in which it is used." Miller v. Continental Insurance Company, 40 N.Y.2d 675, 389 N.Y.S.2d 565 (1976).

Petitioner suggests that even if the term "communicable disease" is unambiguous, it is nevertheless unduly broad and therefore, presumably, legally unenforceable.

He supports this argument by citing to 12th Street Gym, Inc. v. General Star Indemnity Co., 93 F.3d 1158 (3d Cir. 1996). That case, however, did not involve the actual transmission of the AIDS virus; indeed, a close reading of the case suggests that had the facts been such, the Third Circuit would have had no difficulty in enforcing the exclusion.

As the Appellate Division correctly noted below, the fact that the exclusionary endorsement operated to preclude coverage for injury caused by the transmission of any communicable disease, does not render its language unduly broad. The unambiguous intent of the exclusion, clearly and concisely communicated to the reader, is that there is no coverage under the policy where the insured injures someone by infecting him with a disease.

The average person has no difficulty in appreciating the affect of this exclusion on his homeowners coverage. Even though the exclusion may cover a range of diseases and a variety of means of transmission, there is nothing misleading (or even "unfair") about its scope.

New York courts have long recognized that where the only reasonable construction of an insurance contract is the one which happens to be favorable to the insurer, there nevertheless should be no reluctance to enforce it. Loblaw, Inc. v. Employer's Liability Assurance Corp., 57 N.Y.2d 872, 456 N.Y.S.2d 40 (1982). The courts below committed no error in

following this principle in their analysis of the scope of the exclusion.

Under settled principles of New York Law, Respondent carried its burden of showing that Petitioner's claim fell squarely within the exclusionary clause of the policy. There was no error, therefore, in determining that Respondent owed no duty to defend or indemnify its insured for the claims made by Petitioner against him. M.H. Lipiner & Son, Inc. v. The Hanover Insurance Company, 869 F.2d 685 (2d Cir. 1989).

CONCLUSION

For the reasons set forth above, Respondent respectfully requests that the Petition for a Writ of Certiorari be denied.

Respectfully Submitted,

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